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# Comment: Duty to Warn and the Sophisticated User Defense in Products Liability Cases

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# COMMENT

## DUTY TO WARN AND THE SOPHISTICATED USER DEFENSE IN PRODUCTS LIABILITY CASES

*The sophisticated user defense provides a defense to manufacturers in products liability failure to warn cases. The defense is premised on the theory that a manufacturer has no duty to warn users of the product who have the sophisticated knowledge necessary to understand the risks associated with use of the product. Courts are in disagreement, however, as to the validity of this defense in failure to warn actions. In this comment, the author traces the development of products liability law and analyzes the application of Restatement (Second) of Torts sections 388 and 402A in failure to warn cases. The author discusses the use of the defense by asbestos manufacturers and examines the validity of the defense in Maryland. Finally, the author proposes the elimination of strict liability failure to warn actions.*

### I. INTRODUCTION

Although no one statute or court decision has single-handedly changed the face of products liability law,<sup>1</sup> various small developments in the area of products liability have amounted to a legal revolution.<sup>2</sup> One of the most important changes occurred in 1962 when the California Supreme Court recognized a new cause of action in products liability cases, namely, strict liability in tort.<sup>3</sup> Since the adoption of strict liability in tort, courts have struggled to balance the competing interests of individuals injured by defective products and the interests of manufacturers in producing and marketing products that are valuable to society. An issue that is becoming increasingly important in this area of law is the validity of the sophisticated user defense. Although the defense was recognized many years ago,<sup>4</sup> it was rarely used until its recent emergence as a defense in asbestos litigation cases. Another major change in the law of products liability could evolve as more courts recognize this defense in strict liability actions.

This comment begins with an overview of the developments of products liability law in the United States. It then focuses on the validity of the sophisticated user defense in causes of action based on a manufacturer's duty to warn under theories of strict liability and negligence. Particular emphasis is placed on the courts' analyses of this duty to warn under the Restatement (Second) of Torts sections 388 and 402A, and how such analyses affect a court's willingness to accept the sophisticated user defense. The comment then discusses the use of that defense in suits

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1. R. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 3 (1980).

2. *Id.*

3. *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

4. *Rosebrock v. General Electric Co.*, 236 N.Y. 227, 140 N.E. 571 (1923).

against asbestos manufacturers and examines the validity of the sophisticated user defense in Maryland. Finally, the comment proposes the elimination of failure to warn actions under Restatement (Second) of Torts section 402A as a cause of action in products liability cases.

## II. BACKGROUND: DEVELOPMENT OF STRICT LIABILITY

### A. *The Evolution of Strict Liability*

Products liability is the legal theory that holds manufacturers and sellers of chattels strictly liable to third parties for injuries caused by the chattels.<sup>5</sup> At common law, a manufacturer or seller of a chattel was liable only to those with whom he was in privity of contract;<sup>6</sup> however, the privity requirement quickly became riddled with exceptions. The courts began eliminating the privity requirement by extending the liability of manufacturers to any third party injured by products that were "inherently dangerous" to human safety.<sup>7</sup> This exception to the privity requirement was expanded even further when the New York Court of Appeals held in *MacPherson v. Buick Motor Co.*<sup>8</sup> that privity was not required where there was a "negligently made product which [was] inherently dangerous."<sup>9</sup> Similarly, the Supreme Court of New Jersey, in *Henningesen v. Bloomfield Motors, Inc.*,<sup>10</sup> concluded that privity was no longer required in products liability cases based on breach of warranty. The court held that a warranty runs with the goods from the manufacturer to the ultimate purchaser of the product as well as to anyone who could reasonably be expected to use the product.<sup>11</sup> Therefore, lack of privity was no longer a defense for a manufacturer in a suit by an individual injured by the manufacturer's product. As Professor Prosser noted, the

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5. W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 98, at 1692-94 (5th ed. 1984).

6. *Winterbottom v. Wright*, 152 Eng. Rep. 402 (1842) (reasoning that the requirement of privity of contract would eliminate outrageous consequences that would occur if liability of sellers and manufacturers was extended beyond the scope of the contract).

7. *Thomas v. Winchester*, 6 N.Y. 397 (1852). Although courts adopted this exception to the privity requirement, uncertainty arose when deciding which products were inherently dangerous to human safety. The courts usually limited application of this exception to special products such as food, dangerous weapons, mislabeled drugs, and explosives. See generally W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 96, at 682 (5th ed. 1984).

8. 217 N.Y. 382, 111 N.E. 1050 (1916).

9. *Id.* at 389-95, 111 N.E. at 1053-55. Justice Cardozo, writing for the New York Court of Appeals, stopped one step short of adopting strict liability. The opinion provided that an injured party no longer was required to be in privity with the manufacturer in order to sustain a cause of action against that manufacturer; however, the injured party was still required to prove negligence on the part of the manufacturer. *Id.*

10. 32 N.J. 358, 161 A.2d 69 (1960).

11. *Id.* at 384, 161 A.2d at 84. The court based its holding on the grossly unequal bargaining power between manufacturers and consumers. *Id.* at 373-84, 161 A.2d at 78-84.

"citadel of privity" had fallen, and "what followed was the most rapid and altogether spectacular overturn of an established rule of law in the entire history of the law of torts."<sup>12</sup>

The evolution of the common law requirement of privity of contract reached its peak when the Supreme Court of California in *Greenman v. Yuba Power Products, Inc.*,<sup>13</sup> recognized strict liability in tort as a viable cause of action in a products liability case.<sup>14</sup> Not only did the court hold that privity of contract no longer is required in a products liability case, it also ruled that an injured plaintiff is no longer required to prove negligence or breach of warranty.<sup>15</sup> The court concluded that a manufacturer is strictly liable in tort for every product it places in the stream of commerce containing a defect that causes an injury to an individual who could reasonably be expected to use that product.<sup>16</sup>

More than a decade after *Greenman*, the Court of Appeals of Maryland refused to accept this strict liability theory.<sup>17</sup> In 1976, however, fourteen years after *Greenman*, the Court of Appeals of Maryland recognized strict liability in tort in *Phipps v. General Motors Corp.*<sup>18</sup> The court held that a manufacturer of automobiles is strictly liable in tort for inherently dangerous design and manufacturing defects in its products.<sup>19</sup> In *Phipps*, the Court of Appeals of Maryland joined the majority of jurisdictions by recognizing strict liability in tort.<sup>20</sup>

### B. Application of Strict Liability in Products Liability Cases

The language of section 402A of the Restatement (Second) of

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12. W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 97, at 690-92 (5th ed. 1984).

13. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

14. *Id.* at 62-64, 377 P.2d at 900-02, 27 Cal. Rptr. at 700-02. In *Yuba*, the plaintiff was injured when a piece of wood flew from a defective power tool he was using, striking him in the head. *Id.* at 61, 377 P.2d at 898, 27 Cal. Rptr. at 698. Justice Traynor, writing for the court, concluded that it was not a matter of warranty or negligence, but simply a matter of strict liability in tort. *Id.* at 62-64, 377 P.2d at 900-02, 27 Cal. Rptr. at 700-02.

15. *Id.* at 62-64, 377 P.2d at 900-01, 27 Cal. Rptr. at 700-01.

16. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

17. See *Volkswagen v. Young*, 272 Md. 201, 321 A.2d 737 (1974) (On a certified question of law from the United States District Court for the District of Columbia, the Court of Appeals of Maryland rejected strict liability, holding that a manufacturer could be held liable only for a design defect based on principles of negligence.); see also *Frericks v. General Motors Corp.*, 274 Md. 288, 336 A.2d 118 (1975), *appeal after remand*, 278 Md. 304, 363 A.2d 460 (1976) (Applying the principles set forth in *Young*, the court held that a manufacturer is *not* strictly liable for defects. A manufacturer is required only to produce products with a reasonable measure of safety.).

18. 278 Md. 337, 363 A.2d 955 (1976).

19. *Id.* at 340-46, 363 A.2d at 957-63.

20. See L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[3] n.2 (1985) (listing states that have adopted § 402A); see also Robb, *A Practical Approach to Use of State of the Art Evidence in Strict Liability Cases*, 77 NW. U.L. REV. 1, 9 n.29 (1982) (listing states that have expressly adopted § 402A in case law).

Torts,<sup>21</sup> (section 402A), relied upon by both the *Greenman* court and the *Phipps* court, indicates that the paramount issue in a strict liability case is whether the product had an unreasonably dangerous defect when it left the manufacturer's control. A product can be unreasonably dangerous in three ways: (1) it can be designed defectively; (2) it can be manufactured defectively; or (3) it can be sold without adequate warnings, or any warning at all, of the dangers associated with its use.<sup>22</sup> Section 402A focuses primarily on the condition of the product and not on the reasonableness of the manufacturer's actions as in a negligence suit.<sup>23</sup> Despite this distinction between negligence and strict liability in tort, various courts have defined "unreasonably dangerous defect" by use of a reasonable person standard: a product has an unreasonably dangerous defect when a reasonable person would not put the product into the stream of commerce with knowledge of its harmful character.<sup>24</sup> Use of the phrase "reasonable person" to define unreasonably dangerous defects has consequently caused some confusion in strict liability actions and negligence actions.<sup>25</sup>

Although strict liability actions arising from design defects, manufacturing defects, and failure to warn are all based on section 402A, each is conceptually different.<sup>26</sup> In theory, manufacturers can produce fault-free products; therefore, manufacturers who fail to produce fault-free products are held strictly liable for any design defects<sup>27</sup> or manufacturing defects independent of whether the manufacturers actually knew of the

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21. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Section 402A states:

Special Liability of Seller of Product for Physical Harm to User or Consumer: (1) One who sells any product in a *defective condition unreasonably dangerous* to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold; (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965) (emphasis added).

22. See Robb, *supra* note 20, at 10.

23. *Id.*; see also RESTATEMENT (SECOND) OF TORTS § 402A comments g & i (1965) (section 402A applies only where the *condition of the product* makes it unreasonably dangerous to the consumer).

24. See *Welch v. Outboard Marine Corp.*, 481 F.2d 252, 254 (5th Cir. 1973); *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 492-94, 525 P.2d 1033, 1036-37 (1974).

25. See *infra* notes 93-116 and accompanying text.

26. See generally Keeton, *The Meaning of Defect in Products Liability Law — A Review of Basic Principles*, 45 MO. L. REV. 579, 585-88 (1980) (discussing differences and similarities between the three types of strict liability actions); Annot., 53 A.L.R.3d 239, 243 (1973).

27. See Keeton *supra* note 26, at 585-88. For a discussion on the six major tests used in deciding whether a product's design is inadequate or defective, see Davison, *The Uncertain Search for a Design Defect Standard*, 30 Am. U. L. Rev. 643, 646-47 (1981).

particular defects.<sup>28</sup>

A manufacturer's liability for failure to warn, unlike liability for design defects or manufacturing defects, is based on both negligence and strict liability principles.<sup>29</sup> Under a negligence theory, a manufacturer is liable when it has acted unreasonably in failing to warn of any potential dangers associated with its product that are either known, or should have been known, to the manufacturer.<sup>30</sup> Under principles of strict liability, a manufacturer is strictly liable for failing to warn of any potential dangers associated with the product based on the theory that the product, without an adequate warning, is unreasonably dangerous.<sup>31</sup> Under either theory, a manufacturer has a duty to warn potential users of its product of all *reasonably* foreseeable dangers.<sup>32</sup> This duty, based on public policy, was created because a manufacturer, at relatively little expense, can provide warnings that will assist consumers in avoiding potential harm.<sup>33</sup> Numerous courts have either expressly or impliedly ruled that a manufacturer is required to act *reasonably* in the marketing of its products and is strictly liable when the product, without an adequate warning, is deemed unreasonably dangerous.<sup>34</sup> Once again, use of the word "reasonable" by the courts in strict liability actions narrows any possible distinction between negligent and strict liability failure to warn.

A manufacturer's duty to warn arises when the manufacturer knows of a possible danger associated with the use of a product or when the manufacturer reasonably should be expected to know of the danger by virtue of the manufacturer's special skill or knowledge.<sup>35</sup> Once this duty has been established, various factors are considered in determining the sufficiency of a warning; the content of the warning, the severity of the danger, and the knowledge and expertise of the consumer who will be

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28. See *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 492-94, 525 P.2d 1033, 1036-37 (1974) (strict liability imposes on manufacturers constructive knowledge of the condition of the product).

29. See *generally* Annot., 53 A.L.R.3d 239 (1973).

30. See RESTATEMENT (SECOND) OF TORTS § 388 (1965).

31. See *id.* § 402A comment j (1965).

32. *Pavrides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 338 (5th Cir. 1984); *Reyes v. Wyeth Laboratories, Inc.*, 498 F.2d 1264, 1274-75 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974).

33. *Pavrides*, 727 F.2d at 338.

34. *Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121, 127-31 (9th Cir. 1968). See *generally* Annot., 53 A.L.R.3d 239, 244 (1973).

35. See RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965). A manufacturer is deemed to know of all the actual and reasonably foreseeable dangers of its product at the time the product is marketed; ignorance, although a possible defense in a negligence action, is not a valid defense in a strict liability action. Sales, *The Marketing Defect (Warning and Instructions) In Strict Tort Liability*, in DUTY TO WARN AND OTHER CURRENT ISSUES 10 (1980). Therefore, manufacturers have an obligation to keep abreast with scientific advances that may affect the use and safety of the product. *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076, 1088-91 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

subject to risk when using the product.<sup>36</sup> A warning should communicate to the reasonable consumer information that would provide the consumer with an opportunity to exercise caution necessary for his protection, because the consumer deserves the opportunity to make an informed choice as to whether the utility of the product outweighs the potential risk of harm.<sup>37</sup>

### C. *Defenses to Strict Liability Claims Based on a Manufacturer's Failure to Warn*

Although strict liability lessens the burden on the plaintiff in a suit against a manufacturer for failure to warn,<sup>38</sup> a manufacturer is not without defenses. The primary defenses asserted by manufacturers include: (1) material changes in the condition of the product by the consumer; (2) unreasonable use of the product by the injured party; (3) the "state of the art" defense; (4) the patent danger defense; (5) assumption of risk; and (6) the "sophisticated user" defense.

#### 1. Changes in the Condition of the Product

A manufacturer in a strict liability action has a defense if there has been a substantial change in the condition of the product by a third party subsequent to the time it left the manufacturer's control,<sup>39</sup> or if the user of the product has failed to properly maintain the product.<sup>40</sup> A manufacturer is not liable for improper assembly, misrepair of the product by the user, or improper removal of safeguards by the user.<sup>41</sup> Similarly, in certain limited situations where the product is not in its final form when it leaves the manufacturer's control, the manufacturer is not liable for any defects that occur after the product leaves the manufacturer's

36. Bumgardner, *Warning Problems of the Industrial Machine Manufacturers*, in PROD. LIAB. LITIGATION 1983, at 336 (1983).

37. See, e.g., *D'Arienzo v. Clairol, Inc.*, 125 N.J. Super. 224, 230-31, 310 A.2d 106, 110-11 (1973). For a more detailed discussion on the adequacy of warnings in a strict liability action, see Sales, *supra* note 35, at 13-14.

38. *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57, 62-64, 377 P.2d 897, 900-01, 27 Cal. Rptr. 697, 700-01 (1962); see also *supra* notes 13-16 and accompanying text.

In a strict liability action based on a manufacturer's failure to warn, a plaintiff must prove: (1) the manufacturer knew or should have known of the danger (this requirement, however, is easily satisfied because a manufacturer is deemed to know of all reasonably foreseeable dangers, see *supra* note 30 and accompanying text); (2) the manufacturer had a duty to warn and breached that duty; and (3) the breach of the duty was the proximate cause or, in some jurisdictions, a producing cause of the plaintiff's injuries. Sales, *supra* note 35, at 10-11.

39. Parsons, *Manufacturer Defenses in Product Liability Litigation*, in PROD. LIAB. LITIGATION 297 (1983); *Kiminez v. Dreis & Krump Mfg. Co.*, 552 F. Supp. 301, 305-06 (D.C.N.Y. 1981).

40. See Parsons, *supra* note 39, at 298. For further discussion of the defense of changes in the condition of the product, see W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 102 (5th ed. 1984).

41. Parsons, *supra* note 39, at 299-302.

possession.<sup>42</sup>

## 2. Defenses Related to Unreasonable Use of the Product by the Injured Party

A manufacturer is not liable when the injured party uses the manufacturer's product in an abnormal fashion that is not reasonably foreseeable to the manufacturer.<sup>43</sup> A manufacturer may attempt to raise the plaintiff's contributory negligence as a defense; however, in a majority of jurisdictions, contributory negligence is not a viable defense in a strict liability case.<sup>44</sup> In jurisdictions that have adopted comparative negligence principles, contributory negligence is only a partial defense in a strict liability action.<sup>45</sup>

## 3. "State of the Art" Defense

In some jurisdictions, a manufacturer may produce evidence that it conformed to the common practice and standards of the industry and that its design was in accord with the technological and scientific knowledge of the industry at the time the product was manufactured.<sup>46</sup> This type of evidence is presented by the manufacturer to support the state of the art defense.<sup>47</sup> The admissibility of state of the art evidence in strict liability actions is not universally recognized.<sup>48</sup>

It is well established that the state of the art defense is irrelevant in

42. *Id.* at 303. In these limited circumstances, the basis of the manufacturer's defense is that he had no control over, and therefore no liability for, the final product. *Id.* at 304.

43. *Id.* at 310. For further discussion regarding the unreasonable use of the product by the injured party, see W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 102 (5th ed. 1984).

44. Parsons, *supra* note 39, at 314. Jurisdictions that reject contributory negligence as a defense in strict liability cases reason that because the amount of due care exhibited by a manufacturer is irrelevant in a strict liability action, the care used by the injured party likewise is irrelevant. *Id.*

In *Sheehan v. Anthony Pools*, 50 Md. App. 614, 622-26, 440 A.2d 1085, 1089-92 (1982), *aff'd*, 295 Md. 285, 455 A.2d 434 (1983), the plaintiff brought a products liability action based on negligence, breach of warranty, and strict liability against the manufacturer of a pool for injuries sustained when he fell off the diving board and struck the side of the pool. *Id.* at 615-16, 440 A.2d at 1086-87. The court stated that "[o]rdinary contributory negligence does not bar recovery in a strict liability action; '[t]he only form of plaintiff's negligence that is a defense to strict liability is that which consists in voluntarily and unreasonably proceeding to encounter a known danger, more commonly referred to as assumption of risk.'" *Id.* at 626, 440 A.2d at 1092 (quoting *Luque v. McLean*, 8 Cal. 3d 136, 145, 501 P.2d 1163, 1169, 104 Cal. Rptr. 443, 449-50 (1972)).

45. Parsons, *supra* note 39, at 315.

46. *Id.* at 305.

47. For a complete discussion on the state of the art defense, see Funston, *Failure to Warn Defect in Strict Products Liability: A Paradigmatic Approach to State of the Art Evidence and Scientific Knowability*, 51 INS. COUNSEL J. 39 (1984); Robb, *supra* note 20; Note, *New Jersey Advances the State of the Art in Products Liability*: *Beshada v. Johns-Manville Products Corp.*, 15 CONN. L. REV. 661 (1983).

48. See *infra* notes 50-56 and accompanying text.



strict liability actions based on a manufacturing defect.<sup>49</sup> Courts are divided, however, as to whether state of the art is a valid defense in design defect cases<sup>50</sup> or in strict liability cases based on the manufacturer's failure to warn.<sup>51</sup> Most courts that reject the state of the art defense base their decision on section 402A(2)(a) which states that a manufacturer can be strictly liable even if it "has exercised all possible care in the preparation and sale of [the] product."<sup>52</sup> These courts conclude that state of the art evidence addresses only the issue of a manufacturer's due care, which is irrelevant in a strict liability action.<sup>53</sup> Jurisdictions that admit state of the art evidence rely on one of two rationales. In some jurisdictions, particularly where a consumer's reasonable expectations is the test for defining a defect under section 402A,<sup>54</sup> state of the art evidence is admitted to measure a consumer's reasonable expectation of product performance and safety. Other jurisdictions admit state of the art evidence because a manufacturer is strictly liable only if it knew or should have known of the danger.<sup>55</sup> State of the art evidence, therefore, is relevant to determine the manufacturer's knowledge at the time the product was made.<sup>56</sup>

#### 4. Patent Defect Defense

The traditional rule is that a manufacturer has no duty to warn of dangers that are obvious to the general public.<sup>57</sup> Some courts, however, have rejected this "patent" defense and have held manufacturers liable for injuries to individuals even where the dangers are obvious (i.e., patent dangers).<sup>58</sup> In *Micallef v. Miehle Co.*,<sup>59</sup> the New York Court of Appeals adopted this modern trend and held that a manufacturer is "obligated to

49. Robb, *supra* note 20, at 10-11; L. FRUMER & M. FRIEDMAN, *supra* note 20, at 16A(4)(f)(iii) n.1.

50. Robb, *supra* note 20, at 11-12.

51. *Id.* at 12-19.

52. RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965).

53. See *Jackson v. Coast Paint & Lacquer Co.*, 499 F.2d 809, 812 (9th Cir. 1974); *Beshada v. Johns-Manville Prod. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982); *Berkebile v. Brantley Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975); see also Robb, *supra* note 20, at 14.

54. See Robb, *supra* note 20, at 11; see also Davison, *supra* note 27, at 649-54.

55. See RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965); see also Phillips v. Kimwood Mach. Co., 269 Or. 485, 492-94, 525 P.2d 1033, 1036-37 (1974) (manufacturer may be presumed to know of any potential risk).

56. See Note, *New Jersey Advances the State of the Art in Products Liability: Beshada v. Johns-Manville Products Corp.*, 15 CONN. L. REV. 661, 674-75 (1983).

57. See generally Phillips, *Products Liability: Obviousness of Danger Revisited*, 15 IND. L. REV. 797 (1982); Leibman & Sandy, *Can the Open and Obvious Danger Rule Coexist With Strict Tort Product Liability?: A Legal and Economic Analysis*, 20 AM. BUS. L.J. 299 (1982).

58. See *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); *Byrnes v. Economic Mach. Co.*, 41 Mich. App. 192, 200 N.W.2d 104 (1972); *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976); *Palmer v. Massey-Ferguson, Inc.*, 3 Wash. App. 508, 476 P.2d 713 (1970); Phillips, *supra* note 57; Marschall, *An Obvious Wrong Does Not Make A Right: Manufactur-*

exercise that degree of care in his plan or design so as to avoid *any* unreasonable risk of harm to anyone likely to be exposed to danger when the product is used in the manner for which the product was intended"<sup>60</sup> or for any reasonably foreseeable use.<sup>61</sup>

The manufacturer in *Micallef* argued that the case should be dismissed because the danger in question, removing a foreign object from a press machine, was "open and obvious," and therefore, the manufacturer had no duty to guard against such a patent defect.<sup>62</sup> Although the court noted that this argument had "retained its vitality,"<sup>63</sup> it decided to follow the trend of other courts and adopt a more liberal position.<sup>64</sup> The court reasoned that the traditional rule "suffers from its rigidity in precluding recovery whenever it is demonstrated that the defect was patent,"<sup>65</sup> and that such rigidity may produce harsh, unwarranted results.<sup>66</sup> The court determined that in furthering the public interest it was necessary to increase the responsibility of manufacturers who are in a superior position to recognize and cure both patent and latent defects.<sup>67</sup>

## 5. Assumption of Risk

The patent-latent defense is analogous to, but distinct from, another commonly used defense in products liability cases: assumption of risk.<sup>68</sup> The defense of assumption of risk is defined by two requirements: (1) the plaintiff must know and understand the risk, and (2) the plaintiff must freely and voluntarily choose to incur that risk.<sup>69</sup> The standard applied in the assumption of risk defense is more subjective than in the patent-latent defense: Did the plaintiff fully understand, and voluntarily choose

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*ers' Liability for Patently Dangerous Products*, 48 N.Y.U. L. REV. 1065, 1091-93 (1973).

59. 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976). In *Micallef*, the plaintiff brought a products liability action against the manufacturer of a press machine under the theories of negligent design and manufacture and breach of implied warranty. The plaintiff suffered injuries when his hand became caught in the machine when he tried to remove a foreign object from the machine. The plaintiff knew of the specific danger involved. *Id.* at 379-80, 348 N.E.2d at 573-74, 384 N.Y.S.2d at 117.

60. *Id.* at 385, 348 N.E.2d at 577, 384 N.Y.S.2d at 120 (citations omitted) (emphasis added).

61. *Id.*

62. *Id.* at 382-83, 348 N.E.2d at 575, 384 N.Y.S.2d at 119. The manufacturer relied on the rule of law set forth in *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950) which recognized the traditional rule that a manufacturer is not liable for injuries caused by patent defects. *Id.*

63. *Micallef*, 39 N.Y.2d at 383, 348 N.E.2d at 576, 384 N.Y.S.2d at 119 (citations omitted).

64. *Id.* at 384-86, 348 N.E.2d at 576-77, 384 N.Y.S.2d at 120-21.

65. *Id.*

66. *Id.* at 385, 348 N.E.2d at 577, 384 N.Y.S.2d at 120-21.

67. *Id.*

68. See *supra* notes 57-67 and accompanying text.

69. *Cincotta v. United States*, 362 F. Supp. 386, 406 (D. Md. 1973); *Hooper v. Mougins*, 263 Md. 630, 635, 284 A.2d 236, 239 (1971); see also W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 486-92 (5th ed. 1984).

to incur, the risk?<sup>70</sup> The standard applied to the patent-latent defense is more objective: Was there an obvious risk that a reasonable man would have avoided? When applying the patent defect defense or assumption of risk defense, the manufacturer is relieved of the burden of proving that the plaintiff subjectively appreciated the risk.<sup>71</sup>

### III. THE SOPHISTICATED USER DEFENSE

Another defense asserted in products liability cases, similar to the patent defect defense and the assumption of risk defense, is the sophisticated user defense. The sophisticated user defense is premised upon the theory that purchasers of a product, or professional users of a product, understand the potential risks associated with use of that product; therefore, the manufacturer has no duty to warn an employer-purchaser, or the employer's employees, of known dangers associated with the product.<sup>72</sup> The sophisticated user defense can be distinguished from the patent defect defense in that the risk or danger need not be "obvious." It is distinguishable from assumption of risk in that the manufacturer does not have the burden of proving that the plaintiff knew of, and voluntarily incurred, the risk.

The seminal case in the area of the sophisticated user defense is *Littlehale v. E. I. DuPont de Nemours Co.*,<sup>73</sup> a products liability case based on negligence rather than strict liability. The United States District Court for the Southern District of New York concluded in *Littlehale* that "[t]here need be no warning to one in a particular trade or profession against a danger generally known to that trade or profession,"<sup>74</sup> and if there is no duty to warn the purchaser of the product, then there is no duty to warn an employee of the purchaser.<sup>75</sup> The *Littlehale* court based

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70. W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 486-92 (5th ed. 1984).

71. Micaliff v. Miehle Co., 39 N.Y.2d 376, 384, 348 N.E.2d 571, 576 (1976) (quoting Rheingold, *Expanding Liability of the Product Supplier: A Primer*, 2 HOFSTRA L. REV. 521, 541 (1974)).

72. See *Strong v. E.I. DuPont de Nemours Co.*, 667 F.2d 682, 687 (8th Cir. 1981) (holding that where a user of a product knows of the danger, the manufacturer has no duty to warn); see also Prod. Liab. Newsletter, Nov. 1984, at 1.

73. 268 F. Supp. 791 (S.D.N.Y. 1966). In an action based on a manufacturer's alleged negligent failure to warn of certain inherent dangers in the use of blasting caps, the court indicated that the manufacturer's duty to warn is irrelevant when the purchaser is a sophisticated user. The plaintiff argued that DuPont failed to adequately warn of the dangers associated with the blasting caps it sold to the Navy, the plaintiff's employer. *Id.* at 798. Because the court was exercising its maritime jurisdiction and no single state's law applied, the court applied general principles of products liability. *Id.* at 796-98. The court noted that the existence or adequacy of a warning is relevant only if there is a duty to warn and, in this case, there was no duty on the part of the manufacturer to warn the purchaser based upon the purchaser's high level of expertise with regard to blasting caps. *Id.*

74. *Id.* at 798 (citations omitted).

75. *Id.* at 798-99 (citing *Marker v. Universal Oil Prod. Co.*, 250 F.2d 603, 606 (10th Cir. 1957)).

its decision on a negligent failure to warn theory as found in the language of comment k to the Restatement (Second) of Torts section 388 (section 388), which states that a manufacturer has no duty to warn if it has reason to expect that those for whose use the chattel is supplied will discover its condition and realize the danger.<sup>76</sup>

The court noted that a manufacturer has a duty to warn a purchaser or a user of foreseeable and latent dangers, and this duty may exist even where there is no actual defect in the product.<sup>77</sup> The court stressed, however, that "a manufacturer . . . is not absolutely liable as an insurer but is only required to exercise a reasonable degree of care commensurate with all the circumstances."<sup>78</sup>

As the court in *Littlehale* noted, other courts have concluded that if a manufacturer has no duty to warn a purchaser of its products based on that purchaser's sophisticated knowledge, there is no duty to warn an employee of the purchaser.<sup>79</sup> In *Hopkins v. E. I. DuPont de Nemours & Co.*,<sup>80</sup> a case involving a manufacturer's alleged negligent failure to warn, the Third Circuit, applying Pennsylvania law, concluded that because the foreman had knowledge, or at least as much knowledge as the manufacturer, of the risk of premature detonation of dynamite placed in a newly drilled hole before allowing the heat generated by the drilling to subside, the manufacturer was not negligent in failing to warn of the danger.<sup>81</sup> Therefore, the manufacturer was not liable for the resulting injuries to an employee who was working under the supervision of the foreman.<sup>82</sup> The court based its conclusion on the theory that the manufacturer could reasonably rely on the foreman to warn employees because of the foreman's sophisticated knowledge of the danger, and that in this situation the foreman's failure to warn was a superceding cause eliminating any duty or liability of the manufacturer.<sup>83</sup>

Similarly, the Tenth Circuit has held that a manufacturer has the right to rely on a sophisticated purchaser to protect the purchaser's own

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76. *Littlehale* at 798-99. At the time of the decision, strict liability in tort, as embodied in the Restatement (Second) of Torts section 402A, had not yet been recognized by this court as a viable cause of action. *Id.*

77. *Id.* at 798.

78. *Id.* (citations omitted).

79. *Id.* at 799-803; see *infra* notes 82-92 and accompanying text; see also *Horak v. Pullman, Inc.*, 764 F.2d 1092, 1095-97 (5th Cir. 1985) (Even if the manufacturer of a railroad car had a duty to warn of the risk of injury from opening the car, the manufacturer could not be held liable for either strict liability failure to warn or negligent failure to warn under Texas law because the lack of warning was not the proximate cause of the plaintiff's injuries. The plaintiff had actual knowledge of the risk involved.); *Bradco Oil & Gas Co. v. Youngstown Sheet & Tube Co.*, 532 F.2d 501 (5th Cir. 1976) (sophisticated user defense applied in a strict liability duty to warn case), *cert. denied*, 429 U.S. 1095 (1977).

80. 212 F.2d 623 (3d Cir. 1954).

81. *Id.* at 625-26.

82. *Id.*

83. See *id.* at 626-27.

employees from harm.<sup>84</sup> In *Marker v. Universal Oil Products Co.*,<sup>85</sup> an oil company employee was asphyxiated by carbon monoxide gas when he was lowered into a petroleum refining vessel constructed pursuant to the defendant's design. The plaintiff, in a wrongful death action, alleged that the decedent's death was caused by the defendant's failure to warn of dangers associated with recharging the vessel with a hot catalyst rather than a cold catalyst.<sup>86</sup> The court, interpreting the law of Oklahoma, determined that the decedent's employer had as much knowledge of the risk as did the manufacturer; therefore, the manufacturer had no duty to warn.<sup>87</sup>

The sophisticated user defense was also recognized by the Fifth Circuit in *Bradco Oil & Gas Co. v. Youngstown Sheet & Tube Co.*<sup>88</sup> In *Bradco*, the court, applying Louisiana law, held that a manufacturer has no duty to warn sophisticated purchasers of the dangers of which the purchaser knows or should be aware.<sup>89</sup> Bradco, based upon its own specifications, purchased high strength tubing from Youngstown for use in exploratory oil and gas drilling. During the drilling of a "producer" well, the tubing fractured due to the presence of hydrogen sulfide at the well site; as a result, Bradco was forced to abandon the well and suffered severe financial loss.<sup>90</sup>

Bradco sued Youngstown claiming that Youngstown, the manufacturer, breached its duty to warn of the tubing's susceptibility to becoming brittle when used in wells containing even a trace of hydrogen sulfide. The court denied Bradco's claim explaining that "as an experienced oil and gas producer [Bradco was] chargeable with knowledge that even trace quantities of [hydrogen sulfide] could create a hazard."<sup>91</sup> The court concluded that the proximate cause of the loss was Bradco's own selection of the improper tubing, not Youngstown's failure to warn.<sup>92</sup>

#### A. *Negligent Failure to Warn and Strict Liability Failure to Warn*

Failure to warn actions, like manufacturing and design defect ac-

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84. *Marker v. Universal Oil Prod. Co.*, 250 F.2d 603, 607 (10th Cir. 1957).

85. *Id.*

86. *Id.* at 604.

87. *Id.* at 604-07; see also *Thibodaux v. McWane Cast Iron Pipe Co.*, 381 F.2d 491, 497 (5th Cir. 1967). In *Thibodaux*, the plaintiff alleged that the manufacturer of cast iron pipe was negligent because it failed to warn the city which installed the pipe that the soil in the area could cause the pipe to corrode and result in a gas explosion. *Thibodaux*, 381 F.2d at 493-94. The court held that the manufacturer did not breach its duty to warn because the consulting engineers hired by the city "were or should have been as knowledgeable of the cast iron pipe as was [the manufacturer], perhaps more so." *Id.* at 497.

88. 532 F.2d 501 (5th Cir. 1976).

89. *Id.* at 503-04. An expert, appearing on behalf of defendant Youngstown, testified that the tubing selected by Bradco was susceptible to becoming brittle when exposed to hydrogen sulfide. *Id.* at 503.

90. *Id.*

91. *Id.* at 504.

92. *Id.*

tions, usually include claims for both negligence and strict liability; however, courts disagree as to whether there is any significant difference between negligent and strict liability duty to warn.<sup>93</sup> Some courts find that a manufacturer's duty to warn under section 402A is separate and distinct from its duty to warn under a negligence theory. Other courts, however, find that a manufacturer's duty to warn under either section 402A or section 388 is substantially the same, and, therefore, should be analyzed only in terms of "reasonableness," a negligence principle.<sup>94</sup> Consequently, the availability of the sophisticated user defense depends upon whether a court analyzes a manufacturer's duty to warn under section 402A or section 388.

To determine whether any differences between the theories exist, it is necessary to compare sections 388 and 402A. The elements of a negligent failure to warn action are set forth in section 388, which provides that a manufacturer is liable to one injured by its product when the manufacturer:

- (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it was supplied, and (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.<sup>95</sup>

According to this theory, a plaintiff must prove that "the manufacturer knew or in the exercise of ordinary care should have known" of the potential hazards.<sup>96</sup>

In contrast, section 402A provides that a manufacturer is strictly liable for selling a product "in a defective condition unreasonably dangerous to the user or consumer or to his property" regardless of whether the seller has "exercised all possible care in the preparation and sale of his product."<sup>97</sup> According to comment j of section 402A, "[i]n order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning . . . as to its use. . . ."<sup>98</sup>

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93. See *infra* notes 103-116 and accompanying text.

94. See *supra* notes 29-31 and accompanying text.

95. RESTATEMENT (SECOND) OF TORTS § 388 (1965).

96. W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 96, at 685 (5th ed. 1984).

97. RESTATEMENT (SECOND) OF TORTS § 402A (1965). For the full text of section 402A, see *supra* note 21.

98. RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965).

Comment j states:

Directions or Warning. In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies . . . will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if

Comment j also states, however, that the manufacturer has a duty to warn only "if he has knowledge, or by the application of *reasonably developed human skill and foresight* should have knowledge, . . . [of] the danger."<sup>99</sup> The language of this portion of comment j conflicts with the body of section 402A which states that strict liability applies regardless of whether "the seller has exercised all possible care in the preparation and sale of his product."<sup>100</sup> Because the language of comment j uses the term "reasonably," which connotes principles of negligence, there is a question as to whether there is any real difference between a manufacturer's duty to warn under section 402A and section 388.<sup>101</sup> Consequently, there is disagreement as to whether foreseeability, a negligence principle, is an element in a strict liability duty to warn case.<sup>102</sup>

Many courts and commentators have concluded that there is no meaningful distinction between a negligence action for failure to warn and a strict liability action for failure to warn.<sup>103</sup> The New York Supreme Court, Appellate Division, in *Rainbow v. Albert Elia Building Co.*,<sup>104</sup> concluded that there is no significant difference between a section 388 analysis and a section 402A analysis in failure to warn cases.<sup>105</sup> The court reasoned that "[u]nder either theory, the recovery ultimately depends upon a subjective determination by the trier of the facts of what constitutes reasonable warning under all the circumstances."<sup>106</sup> In *Wer-*

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known is one the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonably developed human skill and foresight should have knowledge, or the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warnings as to use may be required.

*Id.*

99. *Id.* (emphasis added).

100. *Id.* § 402A(2)(a).

101. See Connelly, *The Liability of a Manufacturer for Unknown Hazards Inherent in His Products*, 32 INS. COUNS. J. 303, 307 (1965) (no rationale for imposing liability when risk is unknown); Kidwell, *The Duty to Warn: A Description of the Model Decision*, 53 TEX. L. REV. 1375, 1395 (1975) (manufacturers are not required to disclose risks that reasonably diligent inquiries fail to disclose; duty to warn only of foreseeable dangers); Prosser, *The Fall of the Citadel (Strict Liability to the Consumers)*, 50 MINN. L. REV. 791, 811 (1966) (when manufacturer knows or should know of danger, it is under a duty to warn); see also Merrill, *Compensation for Prescription Drug Injuries*, 59 VA. L. REV. 1, 30 (1973).

102. See *supra* note 101 and accompanying text; *infra* notes 104-16 and accompanying text.

103. See *supra* note 101 and accompanying text; *infra* notes 104-16 and accompanying text.

104. 49 A.D.2d 250, 373 N.Y.S.2d 928 (1975).

105. *Id.* at 253, 373 N.Y.S.2d at 930-31.

106. *Id.* Similarly, the Eighth Circuit has stated that under either section 402A or section 388, the key issue is whether there has been a breach of the duty to give proper warning; how this breach is characterized or classified is unimportant to the case. *Sterling Drug v. Yarrow*, 408 F.2d 978, 992 (8th Cir. 1969). The Eighth Circuit has also indicated that there is no duty to warn under section 388 if the user knows or should know of the potential danger, especially when the user is a professional who should be aware of the characteristics of the product. The court recognized that

ner v. Upjohn Co.,<sup>107</sup> the Fourth Circuit concluded that any distinction between the two theories is too small to produce a different result in any case.<sup>108</sup> The court acknowledged that one distinguishing characteristic between the two theories is that in a negligence case, the plaintiff must show a breach of duty by the manufacturer to use due care; in a strict liability action, the plaintiff must show that the product was unreasonably dangerous.<sup>109</sup> The court explained, however, that this distinction lessens considerably in failure to warn cases because "it is clear that [a] strict liability [theory] adds little" to a negligent failure to warn case.<sup>110</sup> The court concluded that the issue is essentially the same in either a negligent failure to warn action or a strict liability failure to warn action: Whether the warning was adequate?<sup>111</sup>

Contrary to this position, other jurisdictions and scholars emphasize an important distinction between negligent failure to warn and strict liability failure to warn actions. Professors Keeton and Wade argue that a manufacturer's lack of awareness of the dangerousness of its product is totally irrelevant in a strict liability action.<sup>112</sup> Based upon the language of section 402A, Professor Keeton argues that a manufacturer is liable even if it used all possible care in the preparation and sale of its product.<sup>113</sup> Some jurisdictions have adopted the view of Keeton and Wade holding that knowledge of a product's defective condition is imputed to the manufacturer in a strict liability claim.<sup>114</sup> The Supreme Court of New Jersey held that, in a strict liability action, the plaintiff need not prove that the manufacturer knew or should have known of the risks associated with the use of its product; such knowledge is imputed to the

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this limitation on the duty to warn is substantially similar to that under strict liability because section 402A states that "a manufacturer has no duty to warn when the dangers of a product are within the professional knowledge of the user." Strong v. E.I. DuPont de Nemours Co., 667 F.2d 682, 687 (8th Cir. 1981).

107. 628 F.2d 848 (4th Cir. 1980). In *Werner*, the Fourth Circuit, interpreting Maryland law, concluded that rule 407 of the Federal Rules of Evidence precludes the admission of evidence of subsequent precautionary measures to prove negligence; therefore, such evidence should not be admitted to prove strict liability because the two theories are substantially the same. *Id.* at 857-58.

108. *Id.*

109. *Id.* at 858.

110. *Id.*

111. *Id.*; see also *Chambers v. G.D. Searle & Co.*, 441 F. Supp. 377, 380-81 (D. Md. 1975), *aff'd*, 567 F.2d 269 (4th Cir. 1977). In *Chambers*, the plaintiff sought damages for injuries allegedly caused by a drug manufactured by the defendant. *Chambers*, 441 F. Supp. at 379. Discussing the viability of the plaintiff's strict liability claim, the United States District Court for the District of Maryland noted that "a theory of strict liability is essentially the same as a theory of negligence in so far as the question of furnishings is concerned . . ." *Id.* at 380.

112. Keeton, *Products Liability—Inadequacy of Information*, 48 TEX. L. REV. 398, 407-08 (1969); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 834-35 (1973).

113. Keeton, *supra* note 112, at 407-09.

114. See *infra* notes 115-16 and accompanying text.



manufacturer.<sup>115</sup> Similarly, the Ninth Circuit has noted a distinction between the two theories in that strict liability is product oriented and negligence is based on the reasonableness of the manufacturer's conduct:

In strict liability it is of no moment what defendant "had reason to believe." Liability arises from "sell[ing] any product in a defective condition unreasonably dangerous to the user or consumer." It is the unreasonableness of the condition of the product, not of the conduct of the defendant, that creates liability.<sup>116</sup>

*B. Section 402A or Section 388 — Effect on the Sophisticated User Defense*

A court's decision that there is, or is not, a significant distinction between section 402A and section 388 in a products liability case based on a manufacturer's failure to warn has a great impact on whether a manufacturer will be able to assert the sophisticated user defense. Courts focusing on the reasonableness of a manufacturer's conduct in warning users of possible dangers associated with the use of its product hold that there is no distinction between the two duty to warn theories.<sup>117</sup> These courts apply a section 388 negligence analysis, which is conduct-oriented.<sup>118</sup> Consequently, these courts more willingly recognize the sophisticated user defense.<sup>119</sup> This point is demonstrated in *Strong v. E. I. DuPont de Nemours Co.*,<sup>120</sup> where the Eighth Circuit, applying a section 388 analysis, held that there is no duty to warn under Nebraska law if the user knows or should know of the potential danger, especially when the user is a professional who should be aware of the product's characteristics.<sup>121</sup> In *Strong*, a construction supervisor for Nebraska Natural Gas Co. was investigating a reported gas leak in a hotel. Cold weather caused a two-inch section of pipe and a connecting device to shrink, resulting in the leak and ultimately in an explosion at the hotel causing the fatal inju-

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115. *Freund v. Cellofilm Properties, Inc.*, 87 N.J. 229, 432 A.2d 925 (1981). The court, citing *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 498, 525 P.2d 1033, 1039 (1974), noted that under a strict liability theory, the seller's knowledge of the product's defect is presumed, whereas in negligence cases, such knowledge must be proved based on the standard of what the manufacturer knew or should have known. *Freund*, 87 N.J. at 239, 432 A.2d at 929-30.

116. *Jackson v. Coast Paint & Lacquer Co.*, 499 F.2d 809, 812 (9th Cir. 1974) (correction in original) (action by a painter against the manufacturer of certain paint products based on the manufacturer's failure to warn); cf. *Beshada v. Johns-Manville Prod. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982) (the court rejected the state of the art defense in strict liability failure to warn cases).

117. See *infra* notes 120-31 and accompanying text.

118. See *infra* notes 120-31 and accompanying text.

119. See *infra* notes 120-31 and accompanying text.

120. 667 F.2d 682 (8th Cir. 1981).

121. *Id.* at 687; see also *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457, 464-65 (5th Cir. 1976).

ries of the supervisor.<sup>122</sup> The court, relying on subsection b of section 388, granted one defendant's motion for a directed verdict holding that there was no duty to warn because both the decedent and his employer knew, or should have known, of the dangers.<sup>123</sup> The court noted that even if a manufacturer is under a duty to warn, its failure to do so would not be the proximate cause of an injury if the user and his employer were aware of the danger and could have avoided the danger themselves.<sup>124</sup>

Similarly, the Ninth Circuit, interpreting the law of Montana, held in *Jacobson v. Colorado Fuel & Iron Corp.*<sup>125</sup> that a manufacturer does not have a duty to warn when the purchaser of the product and his supervising personnel have knowledge that use of the product is potentially harmful.<sup>126</sup> In *Jacobson*, an employee was killed when a steel strand manufactured by the defendant snapped while being used by the employer.<sup>127</sup> After analyzing the language of both section 402A and section 388,<sup>128</sup> and reviewing case law,<sup>129</sup> the court held "the manufacturer had no duty to warn the purchaser of danger already known by the purchaser and its supervising personnel."<sup>130</sup> The court noted that if there is a duty to warn, it is the duty of the employer, not the manufacturer, to warn its employees of dangers of which it had knowledge.<sup>131</sup>

Other courts, however, distinguish between the section 388 negligence approach and the section 402A strict liability approach in duty to warn cases.<sup>132</sup> These courts view the section 402A strict liability ap-

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122. *Strong*, 667 F.2d at 683-84.

123. *Id.* at 687.

124. *Id.* at 688; see also *Hammond v. Nebraska Natural Gas Co.*, 204 Neb. 80, 86, 281 N.W.2d 520, 524 (1979) (the court noted that where the danger is known throughout the industry, the user's duty to the public is nondelegable and the user cannot rely on the manufacturer to warn the public).

125. 409 F.2d 1263 (9th Cir. 1969). *But cf.* *Jackson v. Coast Paint & Lacquer Co.*, 499 F.2d 809 (9th Cir. 1974) (five years later, the Ninth Circuit rejected the sophisticated user defense under the law of Montana).

126. 409 F.2d at 1272-73.

127. *Id.* at 1264-65. The steel strand was being used by the employer in a concrete pressing operation as both horizontal reinforcement tendons, the manufacturer's intended use, and as vertical hold-down cables, a use designed by the employer's technicians. *Id.* The technicians and the employer knew that the unintended use was potentially dangerous. *Id.* at 1265.

128. *Id.* at 1270-71. The court discussed both section 402A and section 388. *Id.* It is unclear, however, as to which theory it relied upon when making its ultimate decision. The court indicated that it would reach the same conclusion under either section 402A or section 388, finding no difference between a manufacturer's duty to warn under either section 402A or section 388. See *id.* at 1273.

129. See *Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121 (9th Cir. 1968) (a manufacturer is under a duty to warn of dangers in potentially dangerous products); *Hopkins v. E.I. DuPont de Nemours & Co.*, 212 F.2d 623 (3d Cir. 1954) (applying section 388, the court held that a manufacturer does not have a duty to warn where it reasonably believes the users of the chattel knew or should have known of any potential dangers).

130. *Jacobson*, 409 F.2d at 1273.

131. *Id.* at 1272.

132. See *Freund v. Cellofilm Properties, Inc.*, 87 N.J. 229, 432 A.2d 925 (1981); Marti-

proach as "product-oriented."<sup>133</sup> Thus, they focus on the potential dangers associated with the use of the product when sold without adequate warning, not on the "reasonableness" of the manufacturer's actions.<sup>134</sup> Under this approach, it is the reasonableness of the product's condition, not the conduct of the manufacturer, that creates liability.<sup>135</sup> The confusion as to whether a section 388 negligence analysis or a section 402A strict liability analysis applies in a strict liability failure to warn action is facilitated by the unavoidable use of the negligence term "reasonableness" under either theory.<sup>136</sup>

The section 402A strict liability theory places a greater duty on a manufacturer to warn of potential dangers associated with the use of a product than does the section 388 negligence theory.<sup>137</sup> The manufacturer's duty to warn under a section 402A strict liability theory extends to the "ultimate user" of the product, and the adequacy of the warning is measured according to the common knowledge and understanding of the ordinary user or consumer; the superior knowledge of the user's employer or supervisors is irrelevant.<sup>138</sup> It is for this reason that courts applying a section 402A analysis to duty to warn cases generally reject the sophisticated user defense.

Despite having recognized the sophisticated user defense five years earlier in *Jacobson v. Colorado Fuel & Iron Corp.*,<sup>139</sup> the Ninth Circuit, again applying Montana law, rejected the sophisticated user defense in *Jackson v. Coast Paint & Lacquer Co.*<sup>140</sup> The court distinguished *Jacobson* on its facts. The product in *Jacobson* was bulk steel, and any warning placed on the product could not reasonably be expected to reach the ulti-

nez v. Dixie Carriers, Inc., 529 F.2d 457 (5th Cir. 1976); *Jackson v. Coast Paint & Lacquer Co.*, 499 F.2d 809 (9th Cir. 1974); *Hamilton v. Hardy*, 37 Colo. App. 375, 549 P.2d 1099 (1976); *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 525 P.2d 1033 (1974); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975).

133. *Freund v. Cellofilm Properties, Inc.*, 87 N.J. 229, 238, 432 A.2d 925, 929 (1981); *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 498, 525 P.2d 1033, 1039 (1974).

134. *Freund* at 238, 432 A.2d at 929; *Phillips* at 498, 525 P.2d at 1039.

135. See *infra* notes 140-47 and accompanying text.

136. See *Wade supra* note 112, at 832-33 (Professor Wade notes that use of the term "unreasonably dangerous" in strict liability gives rise to connotations of negligence).

137. *Jackson v. Coast Paint & Lacquer Co.*, 499 F.2d 809, 812 (9th Cir. 1974) (citing RESTATEMENT (SECOND) OF TORTS § 402A comments j & i (1965)).

138. *Jackson*, 499 F.2d at 812-13. With regard to a manufacturer's duty to warn, the issue is "whether the danger, or potentiality of danger, is generally known and recognized; whether the product as sold was 'dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.'" *Id.* at 812 (citing RESTATEMENT (SECOND) OF TORTS § 402A comments j & i (1965)) (emphasis in original).

139. See *supra* notes 125-28 and accompanying text.

140. 499 F.2d 809, 812-13 (9th Cir. 1974). The plaintiff was burned severely during a fire that occurred while he was using paint manufactured by one of the defendants. The label on the paint warned against the inhalation of toxic vapors; however, the label failed to warn the user of the possibility of fire when the paint was used in improperly ventilated areas. *Id.* at 810-11.

mate user.<sup>141</sup> The product in *Jackson*, however, was packaged paint, and it would be reasonable to expect a warning on the packaged product to reach the ultimate user.<sup>142</sup> The court noted that section 402A failure to warn and section 388 failure to warn constitute two separate and distinct theories of liability.<sup>143</sup> The court held that the issue in a strict liability failure to warn action is whether the product, without an adequate warning, is potentially dangerous to the *ordinary consumer* with *ordinary knowledge* common to the community.<sup>144</sup> The *actual knowledge* of the plaintiff is irrelevant.<sup>145</sup> The court further concluded that the manufacturer's duty was to the ultimate user; therefore, "the adequacy of the warnings [on the paint] must be measured according to whatever knowledge is common to painters who will actually open the containers and use the paints," not by the possible superior knowledge of the painter's employer or contractor.<sup>146</sup>

Distinguishing between section 388 negligent failure to warn and section 402A strict liability failure to warn, the Ninth Circuit emphasized that a manufacturer should be held strictly liable where the product sold is dangerous to an extent beyond that contemplated by the *ordinary consumer* who purchases that product.<sup>147</sup> The court indicated that a manufacturer's duty to warn under section 402A extends to the ultimate user, irrespective of the sophisticated knowledge of the user's employer.

The courts' struggle in deciding whether to distinguish between section 388 negligent failure to warn and section 402A strict liability failure to warn is another example of the continuing battle to balance conflicting interests involved in products liability cases: the consumers' desire to be compensated for injuries caused by dangerous products, and the manufacturers' interest in producing items that are beneficial to the public. Courts that conclude that there is no significant distinction between section 388 negligent failure to warn and section 402A strict liability failure to warn base their conclusion on the theory that any duty to warn on the part of a manufacturer depends upon the reasonableness of the manufacturer's actions in marketing the product without an adequate warning. Consequently, these courts tip the scale in favor of the manufacturers' interest in manufacturing products that are beneficial to the public. Courts that distinguish between section 388 negligent failure to warn and section 402A strict liability failure to warn, however, tilt the scale in favor of the consumers' interest in being compensated for injuries caused

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141. See *supra* notes 125-31 and accompanying text.

142. *Jackson*, 499 F.2d at 813-14.

143. *Id.* at 812-13.

144. *Id.* at 812.

145. *Id.*

146. *Id.* at 812-13.

147. *Id.* at 812; see also *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457 (5th Cir. 1976) (the plaintiff, injured while stripping paint from a barge, claimed that the manufacturer of the chemical product was liable for failing to warn of the product's inherent dangers); RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965).

by products distributed in the market-place. Once a court determines whether to apply a section 402A analysis or a section 388 analysis in duty to warn cases, a manufacturer will know whether the sophisticated user defense is available. If the court recognizes a distinction between section 402A strict liability duty to warn and section 388 negligent duty to warn, the sophisticated user defense should be unavailable to a manufacturer; however, if the court recognizes no distinction and analyzes a manufacturer's duty to warn solely in terms of negligence concepts, the sophisticated user defense should be available to the manufacturer.<sup>148</sup> Unfortunately, this may not always be the case. In two recent decisions, the Fourth Circuit, applying the law of Virginia, failed to recognize the sophisticated user defense in one case but accepted the defense in a second case, notwithstanding that each was analyzed under the same theory: section 388 negligent failure to warn.<sup>149</sup>

The sophisticated user defense was rejected by the Fourth Circuit in *Oman v. Johns-Manville Corp.*,<sup>150</sup> an action by shipyard workers against asbestos manufacturers for injuries allegedly caused by the asbestos manufacturers' failure to warn of the dangers associated with exposure to asbestos products.<sup>151</sup> The court focused on whether the manufacturers' duty to warn was discharged because the purchaser of the product, who was also the employer of the injured employees, had sophisticated knowledge of the dangers associated with the use of the product.<sup>152</sup> The court analyzed the case under section 388 negligent failure to warn concepts<sup>153</sup> because the doctrine of strict liability in tort, as set forth in section 402A, had not been adopted in Virginia.<sup>154</sup> In addition, Virginia law specifically includes comment n of section 388,<sup>155</sup> which discusses various factors used in determining the reasonableness of the manufacturer's actions in informing a third person of dangers associated with the product.<sup>156</sup> The court noted that these factors include:

- (1) the dangerous condition of the product; (2) the purpose for

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148. See *supra* notes 93-116 and accompanying text.

149. Compare *Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985) (upholding the use of the sophisticated user defense) with *Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir. 1985) (rejecting the use of the sophisticated user defense).

150. 764 F.2d 224 (4th Cir. 1984).

151. *Id.* at 232-33. The court first ruled that the cause of action did not come within the purview of admiralty jurisdiction. *Id.* at 226-32.

152. *Id.* at 232-33. The defendants alleged that the district court erred in charging the jury as to a manufacturer's duty to warn. *Id.*

153. *Id.* Section 388 was adopted by the Supreme Court of Virginia in *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 962, 252 S.E.2d 358, 366 (1979).

154. See *Goodbar v. Whitehead Bros.*, 591 F. Supp. 552, 555 (W.D. Va. 1984) (citing *Matthews v. Ford Motor Co.*, 479 F.2d 399, 401 n.2 (4th Cir. 1973)), *aff'd sub nom. Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985); *Brockett v. Harrell Bros., Inc.*, 206 Va. 457, 462-63, 143 S.E.2d 897, 902 (1965).

155. *Oman*, 764 F.2d at 233 (citing *Jones v. Meat Packers Equip. Co.*, 723 F.2d 370, 373 (4th Cir. 1983)); *Barnes v. Litton Indus. Prod., Inc.*, 555 F.2d 1184, 1188 (4th Cir. 1977); *Goodbar*, 591 F. Supp. at 557.

156. RESTATEMENT (SECOND) OF TORTS § 388 comment n (1965).

which the product is used; (3) the form of any warnings given; (4) the reliability of the third party as a conduit of necessary information about the product; (5) the magnitude of the risk involved; and (6) the burdens imposed upon the supplier by requiring that he directly warn all users.<sup>157</sup>

Analyzing these factors, the court determined that the district court did not err in refusing to instruct the jury that a manufacturer's duty to warn the ultimate user is satisfied if the user's employer has sophisticated knowledge of the dangers. A product containing asbestos fibers is very dangerous, and there is only a slight burden on the manufacturers to place adequate warnings on their products, which could reasonably be calculated to reach the ultimate users.<sup>158</sup>

Two months later, the Fourth Circuit decided *Beale v. Hardy*,<sup>159</sup> a suit by employees of the Lynchburg Foundry against manufacturers who supplied the foundry with silica sand and related products.<sup>160</sup> The Lynchburg Foundry, a large manufacturer of metal castings, used "enormous" quantities of silica sand in its molding process.<sup>161</sup> The sand was delivered to the foundry unpackaged in railroad cars.<sup>162</sup> During the manufacturing process, the silica was broken into tiny particles, which entered the employees' lungs and caused the formation of scar tissue.<sup>163</sup>

The employees claimed the manufacturers were liable for the resulting injuries because they failed to warn the employees of the dangers associated with silica and of methods the employees could have implemented to protect themselves from these dangers.<sup>164</sup> In response, the manufacturers asserted the sophisticated user defense by contending that the foundry had knowledge of the dangers associated with exposure to silica since the 1930's and that only the foundry could communicate an effective warning to its employees.<sup>165</sup> The injured employees answered that the manufacturers' duty to warn of an allegedly latent danger was a nondelegable duty.<sup>166</sup>

The District Court for the Western District of Virginia applied a section 388 analysis of a manufacturer's duty to warn and determined that the availability of the sophisticated user defense depended upon whether the manufacturers had acted unreasonably by relying upon the foundry to warn its employees of the dangers associated with silica.<sup>167</sup>

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157. *Oman*, 764 F.2d at 233.

158. *Id.*

159. 769 F.2d 213 (4th Cir. 1985).

160. *Id.* at 213.

161. *Goodbar v. Whitehead Bros.*, 591 F. Supp. 552, 554 (W.D. Va. 1984), *aff'd sub nom. Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985).

162. *Id.* at 554-55.

163. *Id.* at 555. This disease is known as "silicosis." *Id.*

164. *Id.* at 555.

165. *Id.* at 556.

166. *Id.*

167. *Id.* at 557. Under section 388, a manufacturer is liable for failure to warn when it

The district court examined the factors set forth in comment n of section 388 just as the Fourth Circuit did in *Oman*.<sup>168</sup> The district court found that (1) Lynchburg Foundry was a sophisticated user of silica products and that it had extensive knowledge regarding the dangers associated with inhaling silica dust,<sup>169</sup> (2) the duty to warn may be a nondelegable duty under a strict liability theory, but under negligence standards, such a proposition is not true,<sup>170</sup> and (3) the manufacturers had every reason to expect that the foundry, a sophisticated purchaser, would recognize the dangers and communicate any necessary warnings to its employees.<sup>171</sup> The district court concluded that in negligent failure to warn cases, a manufacturer's duty to warn of the dangers associated with the use of its product, does not extend to the employees of sophisticated purchasers because it would be reasonable for the manufacturers to rely upon the sophisticated purchaser to give an appropriate warning to its employees.<sup>172</sup>

The Fourth Circuit upheld the district court's recognition of the sophisticated user defense.<sup>173</sup> The Fourth Circuit determined that the district court had correctly analyzed the case under section 388,<sup>174</sup> and, therefore, because the foundry had sophisticated knowledge of the hazards associated with silica dust and proper dust control techniques, the manufacturers of the silica products had no duty to warn.<sup>175</sup>

*Beale* and *Oman* indicate that although a court applies a section 388 negligence analysis to a duty to warn claim, the sophisticated user defense still may not be available to manufacturers. The availability of the defense seems to hinge upon the facts of each case and upon an analysis of those facts in terms of the factors set forth in comment n of section 388. In *Oman*, the Fourth Circuit and the district court rejected the defense for three reasons: (1) the product, asbestos, was very dangerous; (2) there was only a slight burden on the manufacturers to put warnings on their products; and (3) such warnings reasonably could have been calculated to reach the employees, because the employees usually han-

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"(a) supplies a defective or dangerous product; (b) has no reason to believe that the user . . . lacks knowledge of this defect or dangerous condition; and (c) cannot reasonably rely upon the purchaser/employer . . . to supply necessary warnings to . . . the ultimate users of the product." *Goodbar*, 591 F. Supp. at 556.

168. See *supra* note 157 and accompanying text.

169. *Goodbar*, 591 F. Supp. at 558, 561-65.

170. *Id.* at 558. The court distinguished the case from *Neal v. Carey Can. Mines, Ltd.*, 548 F. Supp. 357 (E.D. Pa. 1982), in that *Neal* was brought under both theories of negligence and strict liability, and the case at hand was brought only under negligence. *Id.*

171. *Goodbar*, 591 F. Supp. at 558, 560-61.

172. *Id.* at 557, 559-60 (citing *Marker v. Universal Oil Prod. Co.*, 250 F.2d 603 (10th Cir. 1957); see *Littlehale v. E.I. DuPont de Nemours & Co.*, 268 F. Supp. 791 (S.D.N.Y. 1966), *aff'd*, 380 F.2d 274 (2d Cir. 1967).

173. *Beale v. Hardy*, 769 F.2d 213, 214-15 (4th Cir. 1985).

174. *Id.* at 214.

175. *Id.* at 214-15.

dled the products in the original packaging.<sup>176</sup> In *Beale*, although the silica products were dangerous, the silica sand never reached the employees in its packaged form; the sand was delivered to the employees in railroad cars. The court stated that the method used to deliver the sand made it burdensome for manufacturers to put warnings on the sand. Moreover, any such warning reasonably could not be calculated to reach the users because the product was not delivered in its original package.<sup>177</sup> Thus, the *Beale* court determined that it was reasonable for the manufacturers to rely upon the employer/purchaser to warn its own employees of the dangers associated with exposure to silica.<sup>178</sup>

Although the Fourth Circuit applied a section 388 negligent failure to warn analysis in both *Oman* and *Beale*, the factual differences in the two cases led to differing results as to whether the sophisticated user defense was available. Thus, where a product is likely to reach the ultimate user in unpackaged form, the defense is available because any warning put on the product by the manufacturer could not be expected to reach the ultimate user. The defense is unavailable, however, where (1) the product is very dangerous, (2) there is only a slight burden on manufacturers to place warnings on the product, and (3) the warning is likely to reach the ultimate user.

### C. *The Sophisticated User Defense in Asbestos Products Liability Cases*

As evidenced by *Oman v. Johns-Manville Corp.*,<sup>179</sup> the sophisticated user defense recently has become an important issue in products liability cases involving the scope of an asbestos manufacturer's duty to warn insulation workers of the dangers associated with the use of asbestos insulation materials.<sup>180</sup> Traditionally, the asbestos manufacturers have relied primarily on four defenses: (1) general denial; (2) contributory negligence; (3) assumption of risk; and in certain jurisdictions, (4) the state of the art defense.<sup>181</sup> In asbestos cases, as in most other products liability cases, a court's willingness to recognize the sophisticated user defense is dependent upon whether that court applies a section 388 negligence analysis or a section 402A strict liability analysis of a manufacturer's duty to warn.<sup>182</sup>

The Fifth Circuit refused to recognize the sophisticated user defense in a strict liability suit against an asbestos manufacturer in *Borel v.*

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176. See *Oman v. Johns-Manville Corp.*, 764 F.2d 224, 232-33 (4th Cir. 1985).

177. See *Goodbar v. Whitehead Bros.*, 591 F. Supp. 552, 559 n.7 (W.D. Va. 1984), *aff'd sub nom. Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985).

178. See *id.* at 554-55, 557.

179. 764 F.2d 224 (4th Cir. 1985); see also *supra* notes 150-58 and accompanying text.

180. See *supra* notes 150-58 and accompanying text.

181. See *supra* notes 39-71 and accompanying text.

182. See *supra* notes 103-11 and accompanying text. Courts that apply a section 388 negligence analysis in strict liability failure to warn cases hold that the duty of a manufacturer to warn is substantially the same under either section 388 or section 402A. *Id.*



*Fibreboard Paper Products Corp.*<sup>183</sup> The manufacturer appealed the trial court's decision to refuse to instruct the jury that a "product cannot be unreasonably dangerous"<sup>184</sup> if it conforms to the expectations of the industrial purchasers, here, the [asbestos] insulation contractors."<sup>185</sup> The manufacturer argued that the insulation contractors, who were the plaintiff's employers, were sophisticated users of the product and as such had a duty to warn the plaintiff of the potential risks in working with asbestos products.<sup>186</sup> The court, applying Texas law, rejected this contention based upon section 402A and held that a manufacturer is liable to the "ultimate consumer or user" for failure to give adequate warnings.<sup>187</sup> The court held that the presence of an intermediary, such as an employer, does not relieve a manufacturer of its duty to warn the employees who are the ultimate users of the asbestos products.<sup>188</sup>

The reasoning behind the Fifth Circuit's decision in *Borel* is that under a strict liability duty to warn theory, the knowledge of the employer is irrelevant because the duty to warn extends to the ultimate users of the product.<sup>189</sup> Under section 402A, a product is unreasonably dangerous if it is marketed without an adequate warning that could have prevented an injury to the ultimate users; therefore, the manufacturer is held strictly liable.<sup>190</sup> The United States District Court for the Eastern District of Pennsylvania held that the manufacturer has a "nondelegable duty" to provide adequate warnings to the ultimate users.<sup>191</sup> Thus, in duty to warn cases against asbestos manufacturers analyzed under section 402A, the manufacturer's duty to warn extends to the asbestos insulation workers, who are the ultimate users of the asbestos products.<sup>192</sup>

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183. 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). An insulation worker brought suit against various asbestos insulation manufacturers for negligent failure to warn and strict liability failure to warn that exposure to asbestos could cause cancer. The Fifth Circuit affirmed the jury's verdict in favor of the plaintiff on the basis of the strict liability claim. *Id.* at 1081.

184. *Id.* The court noted that "for a product to be unreasonably dangerous, 'it must be so dangerous that a reasonable man would not sell the product if he knew the risk involved.'" *Id.* at 1088 (citing *Helene Curtis Indus., Inc. v. Pruitt*, 385 F.2d 841, 850 (5th Cir. 1967)).

185. *Id.* at 1091.

186. *Id.*

187. *Id.* at 1087-88, 1091.

188. *Id.* at 1091. *But cf. supra* notes 122-28 and accompanying text (the Ninth Circuit, in *Jacobson v. Colorado Fuel & Iron Corp.*, 409 F.2d 1263 (9th Cir. 1969), noted that it is the duty of the sophisticated employer, not the manufacturer, to warn its employees).

189. *Borel*, 443 F.2d at 1091; *see also* *Neal v. Carey Can. Mines, Ltd.*, 548 F. Supp. 357, 368 (E.D. Pa. 1982), *aff'd sub nom. Van Buskirk v. Carey Can. Mines, Ltd.*, 760 F.2d 481 (3d Cir. 1985).

190. *See* RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965).

191. *Neal*, 548 F. Supp. at 368. The court concluded that the manufacturers and suppliers of asbestos insulation products had a duty to warn the employees, the ultimate users of the asbestos products, of the possibility of contracting cancer after exposure to asbestos. *Id.*

192. *Id.*; *see also* *Hammond v. North Am. Asbestos Corp.*, 97 Ill. 2d 195, 454 N.E.2d 210 (1983); *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076 (5th Cir. 1973).

In *Hammond v. North American Asbestos Corp.*,<sup>193</sup> the defendant asbestos manufacturers claimed that they had no duty to warn the plaintiff asbestos insulation workers. The manufacturers argued that although the plaintiffs were the ultimate users, the plaintiffs' employers were "sophisticated purchasers" with as much or more knowledge of the dangers associated with asbestos than the defendants.<sup>194</sup> The manufacturers further argued that they were entitled to rely on the employer/purchaser to give the necessary warnings to its employees.<sup>195</sup> The *Hammond* court rejected the sophisticated user defense for primarily four reasons: (1) the manufacturers knew of the dangerous propensities of asbestos but chose not to warn of the risks;<sup>196</sup> (2) in a section 402A strict liability action, the asbestos manufacturers are liable not only to those in privity with them, but also to the ultimate user;<sup>197</sup> (3) the sellers and manufacturers have a nondelegable duty to produce a safe product and to warn of any potential dangers;<sup>198</sup> and (4) based on the facts and circumstances of the case, the asbestos manufacturers should not rely on others to intervene and make the product safe by warning of any inherent dangers.<sup>199</sup>

The United States District Court for the Northern District of California accepted the sophisticated user defense in an asbestos products liability action in *In re Related Asbestos Cases*.<sup>200</sup> In that case, the defendant asbestos manufacturers asserted that the United States Navy, the employer of the injured plaintiff, was aware of the dangers of asbestos. The manufacturers further claimed that the Navy's failure to warn its employees absolved the manufacturers from liability for failure to warn.<sup>201</sup> After noting that the sophisticated user defense had been accepted in strict liability actions in various federal courts applying state law under diversity jurisdiction,<sup>202</sup> the district court noted that the sophisticated user defense is similar to the affirmative defense that the employer's failure to warn was a superceding cause and the proximate cause of the plaintiff's injuries.<sup>203</sup> The court determined that the sophisticated

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193. 97 Ill. 2d 195, 454 N.E.2d 210 (1983). The plaintiff was the wife of an asbestos insulation worker who suffered from "asbestosis," a cancer-related illness associated with exposure to asbestos. The plaintiff brought an action against numerous asbestos manufacturers for loss of consortium. *Id.* at 198-99, 454 N.E.2d at 213.

194. *Id.* at 208, 454 N.E.2d at 217 (the plaintiff's employers were insulation contractors).  
195. *Id.*

196. *Id.* In this case it was not that the manufacturers provided inadequate warnings; rather, it was that the manufacturers failed to provide any warnings at all. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 208, 454 N.E.2d at 218.

200. 543 F. Supp. 1142 (N.D. Cal. 1982) (applying California law).

201. *Id.* at 1150.

202. *Id.* at 1151 (citing *Bradco Oil & Gas Co. v. Youngstown Steel & Tube Co.*, 532 F.2d 501 (5th Cir.), *cert. denied*, 429 U.S. 1095 (1976); *Littlehale v. E.I. DuPont de Nemours Co.*, 298 F. Supp. 791 (S.D.N.Y. 1966), *aff'd*, 380 F.2d 274 (2d Cir. 1967); *Marker v. Universal Oil Prod. Co.*, 250 F.2d 603 (10th Cir. 1957)).

203. *In re Related Asbestos Cases*, 543 F. Supp. at 1150-51. The court stated that under the defense of superceding cause, the defendant manufacturer still would need to

user defense is a viable affirmative defense in a strict liability duty to warn action under California law.<sup>204</sup>

It is apparent that in products liability cases the sophisticated user defense will be allowed in most negligent failure to warn cases,<sup>205</sup> but the validity of the defense is not as well established in strict liability claims for failure to warn.<sup>206</sup> Focusing on the differences between a negligent failure to warn theory<sup>207</sup> and a strict liability failure to warn theory,<sup>208</sup> some courts have concluded that in a strict liability action the manufacturer's duty to warn cannot depend upon the buyer's or user's knowledge.<sup>209</sup> Moreover, the sophistication of a purchaser, employer, or ultimate user does not obviate a manufacturer's duty to warn under section 402A; such a duty is nondelegable.<sup>210</sup>

Thus, in a strict liability action, the sophisticated user defense more likely will be recognized in a jurisdiction that views a manufacturer's duty to warn under section 402A as substantially similar to section 388. In these jurisdictions, a manufacturer is under a duty only to act reasonably,<sup>211</sup> and if it is reasonable for a manufacturer to expect the ultimate

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prove that the actions of the user or an intermediary (e.g., an employer) were a superceding and proximate cause of the injuries. *Id.*

204. *Id.* at 1151. The district court relied on the dictum in *Fierro v. International Harvester Co.*, 127 Cal. App. 3d 862, 179 Cal. Rptr. 923 (1982), where the California court noted that the manufacturer of a truck had no duty to warn of the hazards of the truck's fuel tank design because the features and dangers were known or readily observable by the employer of the deceased. *Fierro*, 127 Cal. App. 3d at 866, 179 Cal. Rptr. at 925.

205. See *Menna v. Johns-Manville Corp.*, 585 F. Supp. 1178, 1185 (D.N.J. 1984). The court concluded that the sophisticated user defense could not be precluded as a matter of law in a negligence action because, based on the language of section 388, the issue in a negligence action is whether the manufacturer acted reasonably in relying upon the user's knowledge or upon the employer to warn his own employees. *Id.* The court did, however, preclude use of the defense as to the strict liability failure to warn claim. See *infra* note 206 and accompanying text; see also *Whitehead v. St. Joe Lead Co.*, 729 F.2d 238, 252-54 (3d Cir. 1984) (the court noted that under New Jersey law the sophisticated knowledge of the defendant is relevant in negligent failure to warn cases but not in strict liability failure to warn cases).

206. See *Menna v. Johns-Manville Corp.*, 585 F. Supp. 1178, 1181 (D.N.J. 1984); see also *supra* notes 133-46 and accompanying text.

207. See RESTATEMENT (SECOND) OF TORTS § 388; see also *supra* notes 133-46 and accompanying text.

208. See RESTATEMENT (SECOND) OF TORTS § 402A; see also *supra* notes 133-46 and accompanying text.

209. See *supra* notes 117-31, 150-78 and accompanying text; see also *Menna*, 585 F. Supp. at 1184. In rejecting the sophisticated user defense as to the plaintiff's strict liability claim, the court stated that under strict liability, a manufacturer that produces defective products is liable even if those products are carefully produced. *Id.* Moreover, liability extends not just to the initial purchaser, but to all foreseeable users. It follows that the duty to warn under section 402A cannot depend on a particular buyer's knowledge or level of sophistication. *Id.*; see also *supra* notes 130-44 and accompanying text (discussion regarding courts that have rejected the sophisticated user defense in nonasbestos cases).

210. *Id.* at 1184-85.

211. See *supra* notes 117-32 and accompanying text.

user, or the user's employer, to know of the potential dangers, the manufacturer will not be held liable despite its failure to adequately warn of the potential dangers.<sup>212</sup> Under a strict liability theory, however, the manufacturer's duty to warn extends to the ultimate user, and the reasonableness of the manufacturer's conduct is irrelevant.<sup>213</sup> Therefore, if the ultimate user is injured by a product due to the manufacturer's failure to provide an adequate warning, or any warning at all, the manufacturer is strictly liable.<sup>214</sup>

#### *D. The Validity of the Sophisticated User Defense in Maryland*

A manufacturer has a duty to warn under Maryland law if the manufacturer's product has "an inherent and hidden danger about which the producer knows, or should know, could be a substantial factor in bringing injury to an individual or his property . . . ."<sup>215</sup> In *Moran v. Faberge*,<sup>216</sup> a minor and her father<sup>217</sup> brought a products liability action against a cologne manufacturer for injuries sustained when the minor's friend poured cologne on a burning candle causing the cologne to ignite and injure the minor.<sup>218</sup> The plaintiffs based their products liability suit upon the theory that Faberge was negligent by failing to warn of the cologne's latent flammability characteristic.<sup>219</sup>

The court emphasized that a manufacturer's duty to produce a safe product, with adequate warnings when necessary, is substantially the same duty that requires individuals to exercise due care in order to avoid unreasonable risk of injury to others.<sup>220</sup> In determining what constitutes an unreasonable risk, the court indicated that the probability and seriousness of the potential harm must be weighed against the costs necessary to avoid the risk of harm.<sup>221</sup> The court noted, however, that in negligent failure to warn cases, the cost of providing an adequate warning is usually comparatively minimal and that the scale will "almost always" weigh in favor of requiring the manufacturer to provide an adequate

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212. *Id.*

213. *See supra* notes 133-46 and accompanying text.

214. *Id.*

215. *Moran v. Faberge, Inc.*, 273 Md. 538, 552, 332 A.2d 11, 20 (1975).

216. *Id.*

217. The plaintiff, Nancy Moran, was a minor at the time the action was initiated. Suit was brought on her behalf by her father, Elbert M. Moran. *Id.* at 539 n.1, 332 A.2d at 12 n.1. Elbert M. Moran was also a plaintiff on his own behalf to recover for medical expenses he incurred for treatment of his daughter. *Id.*

218. *Id.* at 541, 332 A.2d at 13.

219. *Id.* at 542, 332 A.2d at 14. This case was brought under a "negligent" failure to warn theory. *Id.* at 542-43, 332 A.2d at 14-15. Strict liability was not recognized by the court of appeals until approximately one year later. *See Phipps v. General Motors Corp.*, 278 Md. 337, 353, 363 A.2d 955, 963 (1976); *see also supra* notes 16-18 and accompanying text.

220. *Moran*, 273 Md. at 543, 332 A.2d at 15 (citing 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 28.3 (1956) and W. PROSSER, *THE LAW OF TORTS* § 31 (4th ed. 1971)).

221. *Moran*, 273 Md. at 543, 332 A.2d at 15 (citing 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 28.3 (1956) and W. PROSSER, *THE LAW OF TORTS* § 31 (4th ed. 1971)).

warning of latent dangers.<sup>222</sup>

To determine when the duty to warn arises, the court focused on section 388, which has been recognized as the general principle regarding duty to warn in Maryland.<sup>223</sup> The court noted that a manufacturer's duty to warn of latent dangers associated with its product extends "beyond the precise use contemplated by the producer and extends to all those which are reasonably foreseeable."<sup>224</sup> A manufacturer is not liable for failure to warn when its product is mishandled or used in an unusual and unforeseeable manner.<sup>225</sup> The court stressed that the standard for determining whether a particular use is reasonably foreseeable is vague at best;<sup>226</sup> therefore, the reasonableness of a particular use is usually resolved by the trier of fact.<sup>227</sup> One reason for the difficulty in determining what constitutes a reasonably foreseeable use is that a manufacturer may be required to anticipate uses of its product other than the intended use.<sup>228</sup> The law does not go so far as to require that the exact sequence of

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222. *Moran*, 273 Md. at 543-44, 332 A.2d at 15.

223. *Id.* at 544, 332 A.2d at 15 (citing *Twombly v. Fuller Brush Co.*, 221 Md. 476, 158 A.2d 110 (1960) and *Katz v. Arundel-Brooks Concrete Corp.*, 220 Md. 200, 151 A.2d 731 (1959)).

224. *Moran*, 273 Md. at 545, 332 A.2d at 15-16 (citations omitted).

225. *Id.* at 545, 332 A.2d at 16 (quoting RESTATEMENT (SECOND) OF TORTS § 395 comment j (1965)). Comment j states:

The liability stated in this Section is limited to persons who are endangered and the risks which are created in the course of uses of the chattel which the manufacturer should reasonably anticipate . . . . [H]e is not subject to liability when it is safe for all such [normal] uses, and harm results only because it is mishandled in a way which he has no reason to expect, or is used in some unusual and unforeseeable manner.

RESTATEMENT (SECOND) OF TORTS § 395 comment j (1965) (emphasis added).

226. *Moran*, 273 Md. at 549-50, 332 A.2d at 18.

227. *Id.* at 546-47, 332 A.2d at 16-17; see *Twombly v. Fuller Brush Co.*, 221 Md. 476, 158 A.2d 110 (1960). *Twombly* involved an action for damages arising from an illness caused by the plaintiff's use of a spot remover. *Id.* at 481-84, 158 A.2d at 111-14. The court was not confronted with the issue of what constitutes a "reasonable use" because the product in question was being used in its intended manner. *Id.* at 481, 158 A.2d at 111-12. The court did note, however, that it was for a jury to decide whether the manufacturer knew or should have known that the spot remover was dangerous when used as intended, and whether the warning of the danger was adequate. *Id.* at 494, 158 A.2d at 119. Compare *Katz v. Arundel-Brooks Concrete Corp.*, 220 Md. 200, 151 A.2d 731 (1959). In *Katz*, a manufacturer of ready-mix concrete was sued for injuries sustained by the plaintiff while cementing his basement floor. *Id.* at 201-03, 151 A.2d at 732. The plaintiff performed the work without protecting himself from the caustic chemicals contained in the cement. *Id.* The court of appeals upheld the trial court's conclusion that, as a matter of law, the manufacturer had no duty to warn because the caustic character of cement is known to builders, the normal purchasers and users of the cement. *Id.* at 204, 151 A.2d at 733. The court noted that the manufacturer was not liable for failing to warn because the danger was in the realm of common knowledge among professionals who use the product, and because the manufacturer has the right to rely on that knowledge. *Id.* at 204-05, 151 A.2d at 733-34.

228. *Moran*, 273 Md. at 546, 332 A.2d at 16 (quoting RESTATEMENT (SECOND) OF TORTS § 395 comment k (1965)). Comment k states: "The manufacturer may, however, reasonably anticipate other uses than the one for which the chattel is primarily

events leading up to, and resulting in, the injury be foreseeable; however, there will be liability where the injury suffered falls within a "general field of danger" that is reasonably foreseeable to the manufacturer.<sup>229</sup>

The court concluded that a manufacturer has a duty to warn:

[I]f the item it produces has an inherent and hidden danger about which the producer knows, or should know, could be a substantial factor in bringing injury to an individual or his property when the manufacturer's product comes near to or in contact with the elements which are present normally in the environment where the product can reasonably be expected to be brought or used.<sup>230</sup>

It is not necessary that the manufacturer foresee the exact manner in which the injury occurs, it is "only necessary that it be foreseeable to the producer that its product, while in its normal environment, may be brought near a catalyst, likely to be found in that environment, which can untie the chattel's inherent danger."<sup>231</sup> The *Moran* court ultimately held that the trial court's granting of a judgment n.o.v. for the manufacturer was improper because the plaintiffs produced sufficient evidence for the trier of fact to conclude that Faberge knew or should have known that its cologne was a potentially dangerous flammable product, and that Faberge could reasonably foresee that in the environment where the product is normally used (e.g., the plaintiff's friend's home) the cologne might be exposed to an open flame causing the cologne to ignite with such intensity that it would injure persons or property nearby.<sup>232</sup> The court further held that because the evidence produced by the plaintiffs was sufficient to support these conclusions, the manufacturer should have warned potential users of the cologne's latent flammability characteristic.<sup>233</sup>

In *Moran*, the Court of Appeals of Maryland established the general rule regarding a manufacturer's liability for *negligent* failure to warn. Despite Maryland's adoption of section 402A strict liability in 1976,<sup>234</sup> recent cases continue to cite *Moran* as the rule of law regarding a manu-

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intended. The maker of a chair, for example, may reasonably expect that someone will stand on it . . . ."

229. *Moran*, 273 Md. at 551-52, 332 A.2d at 19 (quoting *Segerman v. Jones*, 256 Md. 109, 132, 259 A.2d 794, 805 (1969) and *McLeod v. Grant County School Dist.*, 42 Wash.2d 316, 321, 255 P.2d 360, 363 (1953)); see also F. HARPER, A TREATISE ON THE LAW OF TORTS § 7 (1933).

230. *Moran*, 273 Md. at 552, 332 A.2d at 20 (citations omitted).

231. *Id.* at 552-53, 332 A.2d at 20. The court, quoting the language used by the Supreme Court of Missouri, stated that "[i]f there is some probability of harm sufficiently serious that ordinary men would take precautions to avoid it, then failure to do so is negligence." *Id.* at 553, 332 A.2d at 20 (quoting *Bean v. Ross Mfg. Co.*, 344 S.W.2d 18, 25 (Mo. 1961)).

232. *Moran*, 273 Md. at 553-54, 332 A.2d at 20.

233. *Id.* at 554, 332 A.2d at 21.

234. See *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976); see also *supra* notes 18-19 and accompanying text.

facturer's duty to warn, even where the claim is based on section 402A strict liability failure to warn. For example, in *American Laundry Machinery Industries v. Horan*,<sup>235</sup> the plaintiff brought a products liability suit, based on both negligence and strict liability theories, against the manufacturer of an institutional clothes dryer to recover for injuries sustained when the dryer exploded while being used to dry a hot air balloon.<sup>236</sup> Even though the jury returned a verdict against the manufacturer on the basis of *both* negligence and strict liability,<sup>237</sup> the Court of Special Appeals of Maryland discussed the manufacturer's duty to warn solely in terms of section 388 negligent failure to warn, as set forth in *Moran*.<sup>238</sup> Consequently, the court stated that the pertinent inquiry was whether the injury fell within the general field of danger so that it was reasonably foreseeable.<sup>239</sup> The theory of strict liability was not considered.<sup>240</sup>

Similarly, in *Virgil v. "Kash N' Karry" Service Corp.*,<sup>241</sup> the Court of Special Appeals of Maryland reaffirmed the duty to warn standard established in *Moran*.<sup>242</sup> The court noted that a manufacturer has a duty to warn if the product has a latent danger of which the manufacturer knows, or should know, could cause an injury to the user of the product; the duty extends beyond just the intended use to include all reasonably foreseeable uses.<sup>243</sup> Once again, the court failed to discuss the manufacturer's duty to warn in terms of a section 402A strict liability theory.<sup>244</sup>

It is unclear whether Maryland courts will be willing to analyze a manufacturer's duty to warn under a section 402A strict liability theory. Since the adoption of section 402A strict liability by the court of appeals

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235. 45 Md. App. 97, 412 A.2d 407 (1980).

236. *Id.* at 98-99, 412 A.2d at 410-11.

237. *Id.* at 101, 412 A.2d at 411.

238. *Id.* at 101-08, 412 A.2d at 411-15.

239. *Id.* at 104, 412 A.2d at 413.

240. *Id.* at 108-09, 412 A.2d at 415. The court concluded that the manufacturer's contentions that strict liability is unconstitutional and inapplicable to this case were moot. *Id.*

241. 61 Md. App. 23, 484 A.2d 652 (1984). A products liability action was brought against a manufacturer and a seller of a thermos for injuries sustained by the plaintiff when the thermos imploded while the plaintiff was pouring milk into it. *Id.* at 27, 484 A.2d at 654. The court of special appeals held that the trial court erred in granting a directed verdict in favor of the defendants as to the strict liability and breach of warranty claims, but that there was no error in granting a directed verdict in favor of the defendants as to the negligence claim. *Id.* at 34, 484 A.2d at 658.

242. *Id.* at 33-34, 484 A.2d at 657-58.

243. *Id.* at 32, 484 A.2d at 657. The plaintiffs argued that because the label on the thermos warned that the product contained glass and should not be used by children, an inference should have been drawn that the "manufacturer had reason to know that the thermos would be inherently dangerous for a reasonably foreseeable use." *Id.* at 34, 484 A.2d at 657. The court held, however, that knowledge that the thermos contained glass, which is breakable, in no way constitutes knowledge that the thermos was defective by reason of the alleged unreasonably dangerous characteristic. *Id.* at 34, 484 A.2d at 657-58.

244. *Id.* The court did discuss section 402A with regard to manufacturing and design defects. *Id.* at 29-33, 484 A.2d at 655-56.

in *Phipps v. General Motors*,<sup>245</sup> there should be little doubt that strict liability failure to warn is a viable cause of action in Maryland.<sup>246</sup> Recent cases, however, such as *American Laundry* and *Kash N' Karry*, indicate that whether a failure to warn claim is brought under section 388 or section 402A, a manufacturer's duty to warn will be analyzed under a section 388 negligence theory as set forth in *Moran*. Therefore, cases such as *American Laundry* and *Kash N' Karry* suggest that under Maryland law there is no substantial difference between section 388 negligent failure to warn and section 402A strict liability failure to warn.

The Fourth Circuit, applying Maryland law, reached the same conclusion.<sup>247</sup> In *Werner v. Upjohn Co.*,<sup>248</sup> the plaintiff brought suit against Upjohn, a drug manufacturer, for negligent and strict liability failure to warn.<sup>249</sup> The jury found Upjohn negligent in failing to properly warn of the side effects of a drug. The jury determined, however, that Upjohn was not strictly liable for marketing an unreasonably dangerous product.<sup>250</sup> Upjohn appealed the jury's award of \$400,000 in damages.<sup>251</sup>

The Fourth Circuit held that the admission of certain evidence at trial constituted reversible error,<sup>252</sup> therefore, the jury award was vacated and the case remanded for a new trial.<sup>253</sup> In discussing whether evidence of subsequent remedial measures should be inadmissible in a products liability case,<sup>254</sup> the court noted that any theoretical difference between a negligent failure to warn claim and a strict liability failure to warn claim should have little effect on the admissibility of evidence of subsequent remedial measures.<sup>255</sup>

In reaching the conclusion that evidence of subsequent remedial measures is inadmissible in strict liability actions, as well as in negligence actions,<sup>256</sup> the court noted that a close similarity exists between the theories of negligence and strict liability.<sup>257</sup> The court stated that any distinc-

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245. See *supra* notes 18-20 and accompanying text.

246. *Id.*

247. *Werner v. Upjohn Co.*, 628 F.2d 848, 857 (4th Cir. 1980).

248. *Id.*

249. *Id.* at 851. The suit also contained claims against Upjohn for negligently marketing the drug and for breach of certain alleged warranties. *Id.* The suit involved the drug "Cleocin," a broad spectrum antibiotic. *Id.* This drug was first approved for use by the Food and Drug Administration in 1970, and it soon became a popular alternative antibiotic for individuals who were allergic to penicillin. *Id.* As the use of Cleocin became more widespread, Upjohn began to receive reports of side effects, such as diarrhea and colitis. *Id.*

250. *Id.* The jury also found Upjohn negligent in marketing the drug, and it found that Upjohn breached its warranties to the ophthalmologist, a co-defendant. *Id.* The jury further found that the ophthalmologist was negligent for prescribing the drug. *Id.*

251. *Id.* The ophthalmologist also appealed the jury's verdict. *Id.*

252. *Id.* at 853.

253. *Id.* at 860.

254. *Id.* at 854-60.

255. *Id.* at 857.

256. *Id.* at 857-58.

257. *Id.* at 858. The court stated, "[t]he elements of both are the same with the exception



tion between negligence and strict liability lessens in failure to warn cases because "it is clear that strict liability adds little" in failure to warn cases.<sup>258</sup> The court further noted that the issue in failure to warn cases under either theory is essentially the same: Whether the warning was adequate?<sup>259</sup> If the Fourth Circuit is correct in its conclusion that under Maryland law there is little significant difference between negligent and strict liability failure to warn actions, the sophisticated user defense is a valid defense in failure to warn actions in Maryland.<sup>260</sup>

Such a conclusion, however, may be too simplistic. Any Maryland court simply could reject the dicta of *Werner* and hold that in a strict liability failure to warn suit, the "reasonableness" of the manufacturer's action is irrelevant. Under this analysis, the court would reject the sophisticated user defense. Nevertheless, because the Court of Appeals of Maryland continually has analyzed failure to warn cases in terms of the negligence principles set forth in *Moran*, and, because the Fourth Circuit has concluded that under Maryland law strict liability adds little to negligence in a failure to warn action, it is reasonable to conclude that the sophisticated user defense is valid in Maryland.

#### IV. PROPOSAL: ELIMINATION OF STRICT LIABILITY FAILURE TO WARN

It is unlikely that courts will reach a consensus as to whether there is any significant difference between section 402A failure to warn and section 388 failure to warn. One solution is to eliminate strict liability failure to warn as a cause of action in products liability cases.<sup>261</sup> Strict liability failure to warn no longer is recognized as a viable cause of action in Ohio.<sup>262</sup> In *Knitz v. Minister Machine Co.*,<sup>263</sup> the Ohio Supreme Court

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that in negligence plaintiff must show a breach of a duty of care by defendant while in strict liability plaintiff must show the product was unreasonably dangerous." *Id.*

258. *Id.* (citing *Chambers v. G.D. Searle & Co.*, 441 F. Supp. 377, 381 (D. Md. 1975), *aff'd*, 567 F.2d 269 (4th Cir. 1977); *Smith v. E.R. Squibb & Sons, Inc.*, 273 N.E.2d 476, 480 (Mich. 1979); W. PROSSER, LAW OF TORTS § 99, at 659 n.73 (4th ed. 1971)). The court determined that "[u]nder a negligence theory the issue is whether the defendant exercised due care in formulating and updating the warning, while under a strict liability theory the issue is whether the lack of a proper warning made the product unreasonably dangerous." *Id.* The court concluded that because the issue is substantially the same under a negligence or strict liability theory, "a decision which admits evidence of subsequent remedial measures on a strict liability theory in a failure to warn case involving an unreasonably dangerous drug would promote substance over form and subvert the policy behind excluding evidence of subsequent remedial measures." *Id.*

259. *Werner*, 628 F.2d at 858.

260. See generally *supra* notes 118-33, 192-95 and accompanying text.

261. See, e.g., *Overbee v. VanWaters & Rogers*, 706 F.2d 768 (6th Cir. 1983) (Ohio no longer recognizes a cause of action in strict liability failure to warn); *Knitz v. Minister Mach. Co.*, 69 Ohio St. 2d 460, 432 N.E.2d 814 (same), *cert. denied sub nom. Cincinnati Milacoon Chem., Inc. v. Blankenship*, 459 U.S. 857 (1982); *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977) (same).

262. See *supra* note 261 and accompanying text.

noted that it is "apparent that the rule imposing obligation on the manufacturer or seller to give suitable warning of a dangerous propensity of a product is a rule fixing a standard of care, and any tort resulting from the failure to meet this duty is, in essence, a negligent act."<sup>264</sup> Based on this language, Ohio courts have concluded that in failure to warn actions, plaintiffs are limited to a negligence theory because strict liability failure to warn is no longer recognized under the law of Ohio.<sup>265</sup>

The elimination of strict liability failure to warn as a cause of action in products liability cases serves two purposes: (1) it resolves the debate as to whether there is any distinction between a manufacturer's duty to warn under theories of negligence or strict liability; and (2) it makes clear that the sophisticated user defense is a valid defense in all failure to warn cases. Moreover, its abrogation leaves intact for injured consumers a cause of action in strict liability for both design and manufacturing defects, and leaves injured consumers an adequate cause of action under a negligence theory in failure to warn cases. This elimination would help courts in their continuing struggle to balance the interests of injured consumers and manufacturers and would make the law regarding a manufacturer's duty to warn more uniform throughout the United States.

## V. CONCLUSION

The sophisticated user defense provides manufacturers with an additional defense in products liability failure to warn cases. The doctrine is based on the theory that manufacturers have no duty to warn professional users, or their employees, because those users have the sophisticated knowledge to understand any risks associated with use of the product. "The linchpin inquiry in application of the sophisticated user defense is whether or not the purchaser is a sophisticated user, thereby obviating the duty to warn."<sup>266</sup> Courts are in disagreement, however, as to the validity of this defense in strict liability failure to warn cases.

Some courts have determined that, although there may be a theoretical difference between a manufacturer's duty to warn under a strict liability theory (as set forth in section 402A) and a manufacturer's duty to warn under general negligence principles (as embodied in section 388), as a practical matter, there is little, if any, distinction between the two. These courts reason that the analysis required under both theories involves the resolution of the same issue: whether a manufacturer acted

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263. 69 Ohio St. 2d 460, 432 N.E.2d 814, *cert. denied sub nom.* Cincinnati Milacoon Chem., Inc. v. Blankenship, 459 U.S. 857 (1982).

264. *Knitz*, 69 Ohio St. at 466 n.5, 432 N.E.2d at 818 n.5 (quoting *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317, 325, 364 N.E.2d 267, 272-73 (1977)).

265. *Knitz*, 69 Ohio St. at 466 n.5, 432 N.E.2d at 818 n.5; *see also Overbee*, 706 F.2d at 770 (the Sixth Circuit upheld the trial court's granting of a directed verdict in favor of the defendant manufacturer as to the plaintiffs' strict liability failure to warn claims).

266. Berg, *Courts Diverge on "Sophisticated User,"* Prod. Liab. Newsletter, Nov. 1984, at 1.

reasonably and with due care under all the circumstances in warning users of any potential dangers associated with use of a product. It is these courts that recognize the sophisticated user defense based on the theory that a jury could find that it was not unreasonable for a manufacturer to fail to warn a user of its product where the user has sophisticated knowledge of the dangers associated with use of that product. In such instances, the manufacturer's failure to warn is not the proximate cause of the user's injuries; rather, the proximate cause is the user's failure to heed his own sophisticated knowledge.

Other courts have rejected the sophisticated user defense, determining that there is a distinction between negligent failure to warn and strict liability failure to warn. Although these courts recognize the validity of the sophisticated user defense in negligence actions, these courts reason that in strict liability the focus is on the dangerousness of the product that is sold without an adequate warning; therefore, the knowledge of the user is irrelevant. Thus, these courts hold that the sophisticated user defense is inapplicable to strict liability failure to warn cases.

It is unlikely that courts will ever reach a consensus as to which of these divergent analyses are correct. One solution is to dispose of strict liability failure to warn as a cause of action in products liability cases. This change, combined with the adoption of the sophisticated user defense, would serve better to balance the competing interests of individuals seeking compensation for injuries caused by products and of manufacturers in producing and marketing products valuable to society.

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